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October 7, 2003

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: ET Docket No. 98-153, Ultra-Wideband Transmission Systems
Ex parte Communication

On behalf of XtremeSpectrum, Inc. and pursuant to Section 1.1206(b)(1) of the Commission's Rules, I am electronically filing this written *ex parte* communication.

***Important note*: This letter comments on the Reply of Cingular Wireless LLC (filed Sept. 17, 2003) to XtremeSpectrum's Opposition (filed Sept. 4, 2003) to Cingular's Petition for Reconsideration (filed May 22, 2003). Kindly associate this letter with that set of pleadings.**

For the most part Cingular's Reply[1] needs no response. XtremeSpectrum will stand on the present record except as to the three points noted here.

1. Notwithstanding Cingular's play on the term "jurisdiction," its statutory argument is raised too late.

Cingular's reconsideration petition argued that Part 15 is unlawful under Section 301 of the Communications Act.[2] In addition to rebutting that argument in detail, XtremeSpectrum noted that Cingular could have raised it at any time during the five-year pendency of the

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[1] Reply to Opposition to Petition for Reconsideration of Cingular Wireless LLC (filed Sept. 17, 2003) (Cingular Reply).

[2] Petition for Reconsideration of Cingular Wireless LLC at 10-12 (filed May 22, 2003).

proceeding, and should not be permitted to spring it at the last minute.[3] Cingular defends its timing in part by stating: "It is well established . . . that jurisdictional arguments may be raised at any point in a proceeding."[4] That rule applies here, says Cingular, because Part 15 is an effort by the Commission to exercise jurisdiction that Congress withheld.[5]

Cingular makes a play on words on the term "jurisdiction." XtremeSpectrum agrees that questions can be raised at any time as to the jurisdiction *of the forum to decide the matter in dispute*. The cases that Cingular cites say only that and no more.[6] Thus, assuming colorable grounds, the cases might support Cingular's raising a belated challenge to the Commission's jurisdiction to hear its reconsideration. But that is not Cingular's aim. Instead, Cingular merely questions the Commission's "jurisdiction" to authorize devices under Part 15. That is a run-of-the mill challenge to an agency's rulemaking. None of the cases cited -- or any others we know of -- provides any excuse for Cingular's having waited five years to raise it.

2. Cingular cites legislative history that fails to support its position.

XtremeSpectrum maintains that Section 302a of the Communications Act empowers the Commission to authorize unlicensed devices, notwithstanding the general licensing requirement in Section 301.[7] Cingular responds: "Congress made clear, however, that it was not altering the

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[3] Opposition of XtremeSpectrum, Inc. to Petition for Reconsideration of Cingular Wireless LLC at 6-7 (filed Sept. 34, 2003) (XtremeSpectrum Opposition).

[4] Cingular Reply at 3.

[5] *Id*.

[6] *See* Cingular Reply at 3 n.15, *citing Barnett v. Brown*, 83 F.2d 1380 (Fed. Cir. 1996); *FW/PBS v. Dallas*, 493 U.S. 215, 231 (1990). Another cited case is unhelpful to Cingular because the court refused to decide whether the court below had jurisdiction to entertain a challenge. *See id.*, *citing Ticor Title Inc. v. FTC*, 814 F.2d 731, 743 (D.C. Cir. 1987). The two remaining cases hold only that a court may strike down an agency action that contravenes the statute -- a point not in dispute here. *See id*., *citing Chamber of Commerce v. Reic* , 74 F.3d 1322, 1327-28 (D.C. Cir. 1996); *Dart v. U.S.*, 848 F.22 217, 222 (D.C. Cir. 1988).

[7] XtremeSpectrum Opposition at 10-11.

[licensing] requirement of Section 301 [by enacting Section 302a(a)]."[8] To support that statement, Cingular cites S. Rep. No. 1276 (1968), *reprinted at* 1968 U.S.C.C.A.N. at 2487.[9]

But the cited page (attached) provides no support for Cingular's assertion. The only reference to Section 301 merely says the new legislation does not override existing technical standards under Section 301, but rather empowers the Commission to apply them to manufacturers.[10] There is no reference to licensing.[11] And the legislative history gives no reason to doubt that Congress intended Section 302a to authorize unlicensed devices notwithstanding Section 301.

3. Congress's "de-licensing" of certain services has no bearing on the Commission's power to authorize unlicensed services.

According to Cingular, Congress's enactment of Section 307(e) proves the Commission lacks authority to authorize unlicensed devices. That section permits the Commission to authorize operation without individual licenses in the maritime radio, aviation radio, citizens

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[8] Cingular Reply at 5 (citation footnote omitted).

[9] *Id*. at 5 n.26.

[10] "The Federal Communications Commission presently has authority under Section 301 of the Communications Act to prohibit the use of equipment or apparatus which causes interference to radio communications and, under Section 303(f), to prescribe regulations to prevent interference between stations. Pursuant to this authority the Commission has established technical standards applicable to the use of various radiation devices. At the outset it should be emphasized, therefore, that this legislation is not primarily designed to empower the Commission to promulgate stricter technical standards with respect to radiation devices but rather to enable it to make these standards applicable to the manufacturers of such devices." S. Rep. No. 1276 (1968), *reprinted at* 1968 U.S.C.C.A.N. at 2486, 2487.

[11] And, needless to say, Congress's mentioning one purpose for the statute does not rule out others. "Of course such explanatory language [setting out one application of a statute] can't be assumed to be exclusive; legislative or agency explanations of a provision may naturally tend to focus on its most salient features." *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003).

band, and radio control services -- a measure that would be unnecessary, says Cingular, if Section 302a authorized unlicensed devices, as XtremeSpectrum contends.[12]

But the language of Section 302a limits the Commission to "reasonable regulations" governing interference potential,[13] while the services named in Section 307(e) are authorized at power levels high enough to pose an undeniable interference risk. Ship stations in the maritime radio service can use hundreds of watts,[14] and aircraft stations in the aviation radio service, several tens of watts,[15] even though both are licensed by rule.[16] The ubiquitous citizens band and radio control transmitters are each permitted four watts.[17] All of these levels are far higher than the Commission has ever judged to be safe for a narrowband unlicensed communications device. Those run orders of magnitude lower, typically in the microwatts. The most powerful such devices anywhere in the Part 15 rules are allowed to use just 19 milliwatts.[18]

Thus, the existence of Section 307(e) proves nothing. Even with Part 15 lawfully on the books, the Commission still required additional authority from Congress to allow operation of maritime, aviation, citizens band, and radio control at significantly high power levels without individual licenses.

* * * *

In short, nothing in Cingular's Reply disturbs the conclusion that the Commission has full statutory authority to allow unlicensed devices under Part 15 of its rules.

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[12] Cingular Reply at 7, *citing* 47 U.S.C. Sec. 307(e).

[13] 47 U.S.C. Sec. 302a(a).

[14] 47 C.F.R. Sec. 80.215.

[15] 47 C.F.R. Sec. 87.131.

[16] 47 C.F.R. Sec. 80.13(c) (ship stations); 47 C.F.R. Sec. 87.18(b) (aircraft stations).

[17] 47 C.F.R. Sec. 95.410 (citizens band); 47 C.F.R. Sec. 95.210 (radio control).

[18] 47 C.F.R. Sec. 15.249(a) (250 mv/m at 3m in 24 GHz band). Higher powers are allowed only for broadband radios. *E.g.*, 47 C.F.R. Secs. 15.247(b) (spread spectrum and digital modulation radios); 47 C.F.R. Sec. 15.255(e) (broadband radios at 57-64 GHz). Although 24 GHz radios with minimum 33 dBi antenna gain are allowed 1.9 watts EIRP, this represents an output power of only 1 milliwatt. 47 C.F.R. Sec. 15.249(b).

If there are any questions about this letter, please call me at the number above.

Respectfully submitted,

Mitchell Lazarus
Counsel for XtremeSpectrum, Inc.

cc: Chairman Michael Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
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LEGISLATIVE HISTORY

RADIO—DEVICES INTERFERING WITH RECEPTION

P.L. 90-379, see page 351

House Report (Interstate and Foreign Commerce Committee) No. 1108, Feb. 27, 1968 [To accompany H.R. 14910]

Senate Report (Commerce Committee) No. 1276, June 21, 1968 [To accompany H.R. 14910]

Cong. Record Vol. 114 (1968)

DATES OF CONSIDERATION AND PASSAGE

House Mar. 12, 1968

Senate June 24, 1968

The Senate Report is set out.

SENATE REPORT NO. 1276

THE Committee on Commerce, to which was referred the bill (H.R. 14910) to amend the Communications Act of 1934 by adding a new section 302 to give the Federal Communications Commission authority to prescribe regulations for the manufacture, sale, offer for sale, shipment, and import of devices which cause harmful interference to radio communications or are capable of causing harmful interference to radio reception, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE AND SUMMARY OF LEGISLATION

The purpose of this legislation (it is identical to S. 1015 which passed the Senate in the 89th Congress), is to give the Federal Communications Commission adequate authority to deal with increasingly acute interference problems arising from the expanding usage of electrical and electronic devices which cause, or are capable of causing, harmful interference to radio reception. It is designed to empower the Commission to deal with the interference problem at its root source—the sale by some manufacturers of equipment and apparatus which do not comply with the Commission's rules.

As reported, the bill, H.R. 14910*, would—

1. Give the Federal Communications Commission authority to prescribe rules applicable to the "manufacture, import, sale, offer for sale, shipment or use" of devices which in their operation are capable of emitting radiofrequency energy by radiation, conduction, or other means in sufficient degree to produce harmful interference to radio communications.

2. Prohibit the use, import, shipment, manufacture, or offering for sale of devices which fail to comply with regulations duly promulgated by the Commission under the authority given it by the bill.

* An identical bill, S. 1977, was introduced by Senator Magnuson in the 90th Cong.

3. Except from its provisions (i) carriers which merely transport interfering devices without trading in them; (ii) the manufacture of such devices intended solely for export; (iii) the manufacture, assembly, or installation of devices for its own use by a public utility engaged in providing electric service; and (iv) the use of such devices by agencies of the Government.

This final exemption is consistent with the provision in section 305 of the Communications Act that the Commission has no regulatory jurisdiction over stations owned and operated by the United States. It provides, however, that such devices shall be developed or procured by the Government under standards or specifications designed to achieve the common objective of reducing interference to radio reception, taking into account the unique needs of national defense and security. Government agencies are fully aware of the need for suppressing objectionable interference and, in many cases, standards adopted by individual agencies are more stringent than those which the Commission would impose. During your committee's consideration of S. 1015 in the 89th Congress, the Director of Telecommunications Management advised your committee by letter that it was his intent, should legislation be enacted, to issue standards to insure that Government equipment meet as a minimum any criteria or standards laid down by the Federal Communications Commission for non-Government equipment. (A copy of this letter is included in the Appendix to this report.)

NEED FOR LEGISLATION

The Federal Communications Commission presently has authority under section 301 of the Communications Act to prohibit the use of equipment or apparatus which causes interference to radio communications and, under section 303(f), to prescribe regulations to prevent interference between stations. Pursuant to this authority the Commission has established technical standards applicable to the use of various radiation devices. At the outset it should be emphasized, therefore, that this legislation is not primarily designed to empower the Commission to promulgate stricter technical standards with respect to radiation devices but rather to enable it to make these standards applicable to the manufacturers of such devices. And, even in those few cases where it would implement its new authority with new or additional technical standards, the Commission has assured your committee that such standards would be developed in close cooperation with industry.

Under the present statute the Federal Communications Commission has no specific rulemaking authority to require that before equipment or apparatus having an interference potential is put on the market, it meet the Commission's required technical standards which are designed to assure that the electromagnetic energy emitted by these devices does not cause harmful interference to radio reception.

This gap in the Commission's authority has undesirable results. Since the prohibition presently falls only on the use of offending equipment, the Commission, in trying to eliminate interference, is confined largely to controlling the use of equipment which interferes with radio communications. In most instances the users have purchased the equipment on the assumption